NO. 43030-4-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

OAKRIDGE HOMES II, LTD., a Washington corporation,
Appellant,

v.

FIRST CITIZENS BANK & TRUST COMPANY, a Washington corporation,
Respondents,

BRIEF OF APPELLANT

Bart Adams, Attorney for Oakridge Homes II, LTD, Appellant
2626 N. Pearl
Tacoma, WA 98407
(253) 761-0141
WSBA #11297

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Secondary Authorities

I.

ASSIGNMENTS OF ERROR

No. 1 The trial court erred in granting First Citizens Bank's summary judgment motion determining that the Purchase and Sale Agreement and Counteroffer are unenforceable because they violate the statute of frauds.

No. 2 The trial court erred in failing to grant the summary judgment motion of Oakridge Homes determining that pursuant to the Purchase and Sale Agreement and Counteroffer the bank is required to pay the school mitigation fees that were liens against the title at closing.

No. 3 The trial court erred in awarding First Citizens Bank attorney's fees for the action below.

No. 4 The trial court erred in failing to award Oakridge Homes its attorney's fees in the action below.

II.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

Issue No. 1:

Does a written agreement for the sale of real property that both incorporates the correct legal description of the property into the agreement and refers to another document that contains the correct legal description of the property being sold satisfy the statute of frauds?

Issue No. 2:

Does a description of real property being sold under a Real Estate Purchase and Sale Agreement that is sufficiently definite to locate the property boundaries without oral testimony or other extrinsic evidence satisfy the statute of frauds?

Issue No. 3:

Does a description of real property being sold under a Real Estate Purchase and Sale Agreement that identifies the property being sold by tax parcel number so the exact property description can be determined by reference to county records satisfy the statute of frauds?

Issue No. 4:

If the Court finds that the Real Estate Purchase and Sale Agreement in this case did not sufficiently identify the property being sold, does the execution of a deed containing the correct legal description of the property by a party asserting the statute of frauds defense satisfy the statute of frauds?

Issue No. 5:

Should the statute of frauds be used to invalidate a Real Estate Purchase and Sale Agreement and perpetrate a fraud where part performance demonstrates there is no dispute about the description of the property being sold?

III.

STATEMENT OF THE CASE

On February 24, 2011, Oakridge Homes II, Ltd. (hereinafter "Oakridge") executed a Purchase and Sale Agreement offering to purchase from First Citizens Bank nineteen (19) developed, but unimproved, residential real estate lots in the Pierce County plat known as Silver Creek Phase III (CP 222-241). The lots were identified as Lots 22 and Lots 28-45 of Silver Creek Phase III (CP 224). The Purchase and Sale Agreement executed by Oakridge Homes on February 24, 2011 contained a complete and accurate legal description of the property that was being purchased (CP 233).

On March 3, 2011 a Counteroffer was executed by First Citizens Bank (CP 242-255). The Counteroffer signed by the bank consisted of the February 24, 2011 Purchase and Sale Agreement Oakridge had signed with handwritten changes but without the page containing the legal description and a one page document titled "Counteroffer Addendum to Real Estate Purchase and Sale Agreement." The Counteroffer Addendum prepared and executed by the bank expressly incorporated the language of the February

24th Purchase and Sale Agreement that Oakridge had signed except for changes identified in that Counteroffer. The language of the Counteroffer incorporating the February 24, 2011 Purchase and Sale Agreement executed by Oakridge into the bank's Counteroffer states:

> All terms and conditions of the offer (Real Estate Purchase and Sale Agreement) dated February 24, 2011, concerning Lots 22, 28 to 45 of Silver Creek Phase III (the Property") by Oakridge Homes II Limited, as Buyer and the undersigned First Citizens Bank as Seller are accepted except for the following changes. (CP 242).

The Counteroffer then lists ten changes to the February 24, 2011 Purchase and Sale Agreement, none of which involve the legal description of the property being sold. The legal description from the February 24, 2011 Purchase and Sale Agreement was therefore directly incorporated into the Counteroffer without change. It is not disputed that the legal description that was incorporated into the Counteroffer by that language is complete and accurate.

In addition to having specific language incorporating the legal description page of the February 24, 2011 Oakridge offer into the Counteroffer, the bank's Counteroffer included a description of

the property being sold. The first page of the bank's Counteroffer identified the lots as:

> Lots 22, 28-45 of Silver Creek Phase III. (CP 242).

Paragraph 4 of the bank's Counteroffer on the second page of that document identifies the property being sold as:

> Lots 22, 28-45 of Silver Creek Phase III, Pierce County, Washington 98375. (CP 243)

In support of the Oakridge Motion for Summary Judgment and in response to the bank's Cross Motion for Summary Judgment two experts on behalf of Oakridge testified that that description itself is sufficient to identify the exact boundaries of the lots being sold. George Peters, a retired assistant vice-president and division underwriter for Chicago Title, Fidelity Title and Ticor Title, with forty-four (44) years of experience underwriting title insurance commitments including sufficiency of legal descriptions used in conveyances, testified in his declaration:

> Lots 22, 28-45 of Silver Creek Phase III Pierce County Washington 98375
>
> That description alone is sufficient to identify the lots being sold. From that description one can refer to the recorded plat of Silver Creek Phase III and locate the exact boundaries of each lot within the plat. Stated

another way, the lots described in the description from the Counteroffer Attached as Exhibit B and Commitment, can only be in the location described in the Plat of Silver Creek Phase 3 as amended by the plat alteration on January 27, 2006.

The legal description in the Counteroffer attached as Exhibit B is sufficient to describe the property to be conveyed at closing, because it correctly identifies specific numbered lots in a specific and uniquely named recorded subdivision plat. (CP 174).

Surveyor Lyle Fox similarly testified:

I was asked to review the purchase and sale agreement entered between Oakridge Homes II Limited and First Citizens Bank for lots 22 and lots 28-45 of Silver Creek Phase III Pierce County, Washington. I have reviewed paragraph 4 of that purchase and sale agreement. Paragraph 4 of the purchase and sale agreement identifies the lots being sold as being 22 and lots 28-45 of the plat known as Silver Creek Phase III in Pierce County Washington. That legal description is sufficient to locate the exact description of the lots being sold without reference to extrinsic evidence. There is only one plat in Pierce County under Silver Creek Phase III. The county will not allow two plats to be recorded with the same name and phase. In order to identify the exact location of the lots being sold under the purchase and sale agreement at issue here all I needed to do was to locate the recorded plat of Silver Creek Phase III. The recorded plat of Silver Creek Phase III, as contained in the Plat Alteration of Lots 20-55 of Silver Creek Phase III, a portion of which is hereto attached, provides a surveyed description of the lots to identify the exact location of each lot's boundaries. The legal description provided in paragraph 4 of the purchase

> and sale agreement allows any competent surveyor to locate the plat and lots being sold and to review the plat and to find the surveyed boundaries and dimensions being of those lots. (CP 133-134).

The bank provided no testimony to refute the testimony of George Peters or the testimony of Lyle Fox. It is undisputed in the record that the fact that the legal description in the Counteroffer from the bank did not state the recording number of the Silver Creek Phase III plat did not render the legal description incomplete and did not affect the ability of any competent title person or surveyor to locate the exact boundaries of the lots sold.

Both the February 24 Purchase and Sale Agreement signed by Oakridge and the Counteroffer prepared and executed by the bank also contained the accurate address and tax parcel number of each of the nineteen (19) lots being sold under the Purchase and Sale Agreement. (CP 236, 255) Both George Peters and Lyle Fox testified that the surveyed boundaries of the parcels sold by the bank to Oakridge could be located from the parcel numbers. (CP 175-176, 134). The bank provided no testimony refuting that testimony.

After the Purchase and Sale Agreement and Counteroffer Addendum to Purchase and Sale Agreement were executed, escrow was opened with Chicago Title. The escrow closer at Chicago Title reviewed the Commitment for Title Insurance and the Purchase and Sale Agreement. The Commitment for Title Insurance listed an encumbrance against title for school mitigation fees owed to the Puyallup School District. (CP 36). Both the February 24, 2011 Purchase and Sale Agreement that was signed by Oakridge Homes and incorporated into the bank's Counteroffer and the bank's Counteroffer that was signed by all parties contained three different provisions requiring the Seller to pay any encumbrances against the property at closing whether they were due before or after closing. Paragraph 14 of both the February 24, 2011 Purchase and Sale Agreement signed by Oakridge Homes and incorporated into the Counteroffer by the language of the Counteroffer and also contained in the Counteroffer itself has the same provision. Paragraph 14 of both documents states:

> Charges and Assessments Due After Closing: prepaid in full by Seller at Closing. (CP 224, 243).

Paragraph G referring to that language of Paragraph 14 of both documents states:

> Charges levied before Closing, but becoming due after Closing shall be paid as agreed in Specific Term No. 14. (CP 226, 245).

There is no dispute that the school mitigation fee was levied against the lots by the terms of the 1996 recorded mitigation agreement and that payment of the amount levied becomes due on application for a building permit. Paragraph C of both the February 24, 2011 Purchase and Sale Agreement and the Counteroffer Addendum also address the encumbrance created by the Recorded school mitigation fee. It states:

> Monetary encumbrances or liens not assumed by Buyer, shall be paid or discharged by Seller on or before closing. (CP 225, 244)

After reviewing those provisions of the Purchase and Sale Agreement, the escrow officer prepared closing documents for the closing of the first ten (10) lots showing the school mitigation fees that she determined to be $3,005.00 per lot to be paid by the Seller. (CP 258). The Buyer signed the necessary closing documents and placed the money to purchase the property in escrow. The

bank's agents signed the Bargain and Sale Deed prepared by escrow that contains the complete and accurate legal description of the lots sold (CP 259) but changed the closing statement by removing the deduction from the Seller's proceeds for school mitigation fees that both the February 24, 2011 Purchase and Sale Agreement and the Counteroffer Addendum allocated to the Seller. (CP 258). The sale failed to close because the bank breached the agreements by refusing to sign closing documents that required the bank to pay mitigation fees in accordance with both agreements. This action followed.

After the action was filed Plaintiff moved for partial summary judgment determining that the school mitigation fees were, by the agreement, to be paid by the Seller. After several continuances at the bank's request, the bank moved for summary judgment claiming that the contract was unenforceable based on the statute of frauds, waiver, and the lack of mutual assent to the contract. (CP 61-71).

The cross motions for Summary Judgment were heard at the same time. The trial judge granted the bank's Summary Judgment motion on the basis that the agreement was unenforceable under

the statute of frauds without addressing the other two arguments asserted by the bank as a defense to the enforceability of the agreement. (RP 22). Plaintiff filed a motion for reconsideration that was heard in January 2012. (CP 324). The Court denied the motion. This appeal followed.

IV.

ARGUMENT

STANDARD OF REVIEW

The trial court below decided this case on cross-motions for summary judgment. The standard of review of an order for summary judgment is de novo review by the Appellate Court and the Appellate Court performs the same inquiry as the trial court. *Smith v. Safeco Insurance Co.*, 150 Wn.2nd 478, 78 P.3d 1274 (2003). The review by this court is de novo based upon the evidence presented below.

LEGAL DESCRIPTION WAS PART OF AND INCORPORATED INTO EXECUTED PURCHASE AND SALE AGREEMENT

The bank's argument that the executed Purchase and Sale Agreement does not contain the legal description of the property sold and that it therefore violated the statute of frauds is factually

wrong and legally unsupportable. The original Purchase and Sale Agreement of February 24, 2011 signed by the Oakridge contains a legal description that the bank admits is the correct and accurate legal description of the property to be sold. The bank prepared a Counteroffer to the February 24, 2011 Purchase and Sale Agreement that was signed by the bank and Oakridge. That counteroffer states:

> All terms and conditions of the offer (Real Estate Purchase and Sale Agreement) dated February 24, 2011, concerning Lots 22, 28 to 45 of Silver Creek Phase III (the Property") by Oakridge Homes II Limited, as Buyer and the undersigned First Citizens Bank as Seller are accepted except for the following changes. (CP 242).

That language of the bank's Counteroffer expressly incorporates the provisions of the February 24, 2011 Purchase and Sale Agreement signed by Oakridge except for changes expressly identified in that Counteroffer. The incorporation includes an incorporation of the legal description from the February 24, 2011 Purchase and Sale Agreement. Washington law holds that the statute of frauds is satisfied if a contract for sale of real property either contains a description of the property sufficiently definite to locate the property without recourse to oral testimony or contains a

reference to another instrument which contains a sufficient legal description. *Bigelow v. Mood*, 56 Wn.2d 340, 353, P.2d 429 (1960). The Counteroffer signed by the bank and Oakridge both incorporates into itself the terms of and refers to the February 24, 2011 offer from Oakridge that contains the legal description. The statute of frauds is satisfied. The Court erred in granting summary judgment based on the statute of frauds.

ADEQUATE LEGAL DESCRIPTION IS CONTAINED IN THE COUNTEROFFER

Even if the full legal description for the property sold was not incorporated into the bank's Counteroffer by express language, the bank's Counteroffer, contains a sufficient description of the property being purchased to satisfy the statute of frauds in two locations, one on the first page of the Counteroffer and one on the second page of the document. (CP 242,243). The full legal description of the first 10 lots to be closed under the takedown schedule mandated by the bank in Counteroffer Addendum to the February 24, 2011 Purchase and Sale Agreement as contained in the commitment for title insurance and in the deed signed by the agent for the defendant bank is:

> Lots 33 to 42, inclusive, Silver Creek Phase 3, according to plat recoded under recording number 200505125002 and amended by plat alteration of lots 20-55 of Silver Creek phase 3, recorded under recording number 200601275010 in Pierce County Washington.

The legal description contained on the second page of the Counteroffer signed by the bank identifies all 19 of the lots to be purchased as:

> Lots 22, 28-45 of Silver Creek Phase III, Pierce County, Washington 98375. (CP 243)

Page one of the Counteroffer Addendum similarly identifies the property being purchased as:

> Lots 22, and 28-45 of Silver Creek Phase III .

The only missing words in the legal description contained in the bank prepared Counteroffer is the recording number of the amended plat which created the lots at issue. The Washington law is absolutely clear that a complete legal description of property being sold need not be contained in the Purchase and Sale Agreement so long as there is a sufficient identification of the property to locate it without resort to oral testimony. *Bigelow v.*

Mood, supra, pg. 11, *Bartlett v. Betlatch*, 136 Wn.App 8, 146 P3d. 1235 (2006). In *Bartlett*, the court, quoting *Bigelow, supra*, said, at page 14:

> A contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony [or extrinsic evidence], or else it must contain a reference to another instrument which does contain a sufficient description.

In the instant case, there is no question that the lots can be located without resorting to extrinsic evidence based upon the legal description contained in the Counteroffer. It is undisputed in the record that there can be only one plat of Silver Creek Phase III in Pierce County. (CP134). The bank produced no evidence disputing the expert testimony of both Lyle Fox and George Peters that the exact legal description of the lots sold by the bank to Oakridge can be determined from the description in the Counteroffer which contains the County, plat name, plat phase, and plat phase lot numbers. The statute of frauds is satisfied by the description of the lots contained in the Counteroffer even if the Counteroffer had not incorporated into the document the February 24, 2011 Purchase

and Sale Agreement that contained the entire legal description. The Court erred in granting summary judgment in favor of the bank on the statute of frauds.

TAX PARCEL NUMBERS INCLUDED IN THE COUNTEROFFER SATISFY THE STATUTE OF FRAUDS

There's no dispute that the parcel number of each parcel being purchased was also included in both the February 24, 2011 Purchase and Sale Agreement and the Counteroffer. (CP 236, 255). A description of property under a purchase and sale agreement is sufficient if it contains a reference to another instrument which contains a sufficient description. In *Bingham v. Sherfey*, 38 Wn.2d 886, 234 P.2d 489 (1951) Washington Supreme Court held that a description in an option to purchase real property that identified the property by tax parcel number was sufficient to satisfy the statute of frauds. There the property was described as follows:

> Tax no. 3, in section 31, township 12 north range 42 [E.W.M. being furnished by judicial notice] as at present designated on the tax rolls in the office of the county assessor of said county.

The court held that since providing a tax parcel number was sufficient to identify the property being sold through reference to county records, the statute of frauds was satisfied. In the instant case, every parcel number of the lots being purchased is included in both the February 24, 2011 Purchase and Sale Agreement (CP 236) and the Counteroffer Addendum (CP 255). The statute of frauds is satisfied.

DEFENDANT'S EXECUTION OF DEED WITH CORRECT LEGAL SATISIFIES STATUTE OF FRAUDS

In the instant case, the Defendant actually signed a Deed for closing of the sale of the first ten (10) parcels to be closed under the Purchase and Sale Agreement. By doing so, the bank representative acknowledged that there is no dispute regarding the correct legal description of the properties being sold. In *Dunbabin v. Allen Realty Company*, 26 Wn.App 660, 613 P.2d 570 (1980) the court found it sufficient to satisfy the statute of frauds that the parties understood the parcels being sold even where no legal description is contained in the Purchase and Sale Agreement. Here, the bank demonstrated that they knew the properties being sold by executing a Deed containing the correct and complete legal

description of the property. The statute of frauds was therefore satisfied.

STATUTE OF FRAUDS IS INAPPLICABLE WHEN BEING USED TO PERPETRATE A FRAUD

The Washington courts have made it clear that the statute of frauds will not be enforced when it is being used to perpetrate fraud or when it leads to inequitable result. *Miller v. McCamish*, 78 Wn.2d 821, 479 P.2d 919 (1971). In that case, the court upheld an oral contract for the purchase of property where there was significant evidence of the existence of the oral agreement citing 49 Am Jur Statute of Frauds stating, at page 825 :

> The purpose and intent of the statute of frauds is to prevent fraud, and not to aid in its perpetration, and courts, particularly courts of equity, will, so far as possible, refuse to allow it to be used as a shield to protect fraud, or an instrument whereby to perpetrate a fraud...

The court went on to state at page 826:

> Thus, this court has long held that an agreement to convey an estate in real property, though required by RCW 64.04.010 and 64.04.020 to be in writing with a formal requisites specified for deed, maybe proved without a writing given sufficient part performance; and that specific performance will be granted where the acts allegedly

> constituting part performance point unmistakably and exclusively to the existence of the claimed agreement.

In the instant case, both parties performed the Purchase and Sale Agreement up to and including the date of closing, including signing closing documents. Unfortunately, the bank altered the closing statement to remove from the expenses to be paid by Seller at closing the liens against the property for the school mitigation fees. Other than that change to the closing documents, both parties fully performed the contract including the bank signing and Oakridge approving the deed with the correct legal description of the lots sold. That part performance unmistakably identifies the lots to be purchased by Oakridge under the agreement and it satisfied the statute of frauds even if no description of the property sold had been included in the Purchase and Sale Agreement. The bank's statute of frauds defense fails and Oakridge is entitled to a reversal of the trial court's ruling that the agreement is unenforceable under the statute of frauds and to a determination by this court that as a matter of law the Purchase and Sale Agreement satisfies the statute of frauds.

WAIVER LANGUAGE IN COUNTEROFFER ADDENDUM ADDRESSES THE PHYSICAL CONDITION OF LAND, NOT THE CONDITION OF THE TITLE TO THE PROPERTY PURCHASED

Although the trial court did not address the argument when it granted Summary Judgment to the bank based upon the statute of frauds, in its cross motion for Summary Judgment the bank argued that language contained in the Counteroffer Addendum executed by the parties waived the right of Oakridge to sue the bank to enforce the bank's obligation to pay the school mitigation fees that the bank is required to pay under both the February 24, 2011 Purchase and Sale Agreement executed by Oakridge and Counteroffer Addendum executed by both parties. The bank's argument is without merit because the release language, which was drafted by the bank releases the bank from liability for defects in the physical condition of the property. It does not provide a waiver of the bank's obligations regarding the condition of the title to the property contained in the agreement and does not modify the bank's obligation to pay the school mitigation fee in the agreement. The language in the Counteroffer Addendum relied on by the bank claiming that Oakridge waived its right to sue the bank states:

AS A MATERIAL INDUCEMENT TO THE EXECUTION AND DELIVERY OF THIS ADDENDUM BY SELLER, BUYER IS PURCHASING THE PROPERTY IN AN "AS IS" AND "WHERE IS" PHYSICAL CONDITION AND IS AN "AS IS" STATE OF REPAIR WITH ALL FAULTS, including, without limitation, latent defects, and other matters not detected in Buyer's Inspections, without recourse to Seller. Except as provided herein and in the documents delivered by Seller at Closing, Buyer waives, and Seller disclaims all warranties of any type or kind whatsoever with respect to the Property, whether express or implied, including, by way of description but not limitation, those quality, merchantability, or fitness for a particular purpose or use, including, without limitation, Buyer's intended uses or purposes. Upon the closing of the purchase and sale contemplated hereby, Buyer shall be deemed to have accepted the Property and each and every portion thereof unconditionally and with a full and complete waiver or any and all (none being implied hereby) rights Buyer may have, acquire, or assert to rescind, set aside, or avoid the transaction contemplated hereby or to seek a reduction adjustment, offset, or recovery of the Purchase Price.

Consistent with the foregoing, Buyer, for itself and its agents, affiliates, successors and assigns, hereby releases and forever discharges Seller and it's agents, affiliates, employees, successors, and assigns (collectively, the "Releases") from any and all rights, claims, and demands at law or in equity, whether known or unknown at the

> time of this Agreement, which Buyer has or may have in the future, arising out of the physical, environmental, economic, or legal condition of the Property, including, without imitation, all claims in tort or contract and any claim for indemnification or contribution arising under the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. Section 960J, *et. seq..)* or any similar federal, state, or local statute, rule, or ordinance relating to liability of property owners for environmental matters. Without limiting the foregoing, Buyer, upon Closing, shall be deemed to have waived, relinquished, and released Seller from and against any and all matters arising out of latent or patent defects or physical conditions, violations or applicable laws, and any and all other acts, omissions, events, circumstances, or matters affecting the Property. For the foregoing purposes, and in consideration of Seller's completion of this transaction, Buyer hereby specifically acknowledges that this release will extend to claims unknown at the time of executing this release which, had they been known to Buyer, would have materially affected Buyer's decision to enter into this Addendum. Buyer hereby specifically acknowledges that Buyer has carefully reviewed this Addendum and discussed (or had amply opportunity to discuss) its import with legal counsel and that the provisions of this Addendum are a material part of the Purchase Agreement. (CP253, 254)

That language clearly addresses defects in the physical condition of the property such as environmental hazards that would affect the

value of the physical property. There is no language in that Addendum Exhibit B that modifies the bank's obligation to provide lien free title that is addressed elsewhere in the Purchase and Sale Agreement. The language of both the February 24, 2011 Purchase and Sale Agreement that was incorporated into the Counteroffer and the Counteroffer Addendum regarding the liens is identical. Paragraph 14 of both documents says:

> Charges and Assessments Due After Closing: prepaid in full by Seller at Closing.

Paragraph G referring to that portion of Paragraph 14 states:

> Charges levied before Closing, but becoming due after Closing shall be paid as agreed in Specific Term No. 14.

There is no dispute that the school mitigation fee was levied against the lots by the terms of the 1996 recorded mitigation agreement and a payment of the amount levied becomes due on application for a building permit. Paragraph C of both the February 24, 2011 Agreement and the Counteroffer Addendum addresse the encumbrance created by the Recorded school mitigation fee. They both state:

> Monetary encumbrances or liens not assumed by Buyer, shall be paid or discharged by Seller on or before closing.

The Addendum Exhibit B language cited by the bank does not modify those provisions of the Purchase and Sale documents that require the bank to pay the school mitigation fees. The bank's waiver argument based upon the language of Addendum Exhibit B of the bank's Counteroffer does not relieve the bank from payment of the school mitigation fees.

The bank's argument that Addendum Exhibit B to the Purchase and Sale Agreement relieves it from paying the school mitigation fees also fails because the waiver language it cites is, by its express terms, effective only upon closing. The language in the first paragraph of Addendum Exhibit B states:

> Upon closing of the Purchase and Sale contemplated hereby Buyer shall be deemed to have accepted the property and each and every portion thereof unconditionally and with full and complete waiver of any and all (none being implied thereby) rights Buyer may have, acquire, or assert to rescind, set aside or avoid the transaction contemplated hereby or to seek a reduction, adjustment, offset or recovery of the purchase price.

By its own terms, the release was a release regarding claims related to the physical condition of property that took effect only at closing. The bank's argument that Addendum B waives claims of Oakridge against the bank regarding the title it was to provide at closing is without merit.

MUTUAL ASSENT REQUIREMENT IS MET

Although not relied on by the court in its decision, the bank, at the Summary Judgment hearing, argued that the contracts executed between the bank and Oakridge are unenforceable because they lack mutual assent. Mutual assent requires only that the parties agree upon the subject matter and terms of a contract. *Pacific Cascade Corp. v. Nimmer*, 25 Wn.App. 552, 608 P.2d 266 (1980). There the court held that mutual assent means having an offer and acceptance of the same bargain at the same time. In the instant case, there is no doubt that the parties signed a written agreement for the purchase of the lots and agreed to all the terms in the documents. By doing that they agreed to the terms of the written document. The signatures to the same written agreement satisfy the mutual assent requirement. The bank's real claim in the trial court was that the bank employee who signed the purchase

documents did not understand the agreement she signed and that she subjectively believed that the bank would not be required to pay the school mitigation fees even though the documents executed clearly state that the bank is to pay those fees. Washington follows the objective manifestation test to determine mutual assent. *Keystone Land and Development Company v. Xerox,* 152 Wn.2d 171, 94 P.3d 945 (2004). The bank objectively manifested its mutual assent to the terms of the agreements signed by signing the Counteroffer with the terms that require it to pay the school mitigation fees. While the bank's employee filed a declaration claiming she subjectively believed that the bank would not be required to pay any deductions from the $26,000 sale price per lot except the real estate commission, excise tax, title insurance and closing costs, the her subjective understanding of what the bank was to pay under the agreement is irrelevant. Under Washington law the court is required to review the terms of contract and determine what a reasonable person would believe that they mean. *Alexander v. Wolhman,* 19 Wash.App 670, 578 P.2d 530 (1978). In the instant case, there is no ambiguity in the language of the agreements signed. They state that the seller is to pay the

expenses for the school mitigation fees. This court should reverse the trial court's Summary Judgment Order that found the contract unenforceable based on the statute of frauds and rule that as a matter of law the bank is required by the agreements between the parties to pay the school mitigation fees and that it breached the agreement by refusing to execute the closing statement prepared by the escrow officer that included the bank's obligation to pay the school mitigation fees.

THE COURT ERRED IN AWARDING ATTORNEY'S FEES

Both parties agree that the agreements executed between them require the prevailing party to pay reasonable attorney's fees and expenses of the other in any legal action instituted to enforce the agreement. Paragraph P of both the February 24, 2011 offer that was incorporated into the Counteroffer and the Counteroffer Addendum signed by the bank contained the identical language that states:

> However, if buyer or seller institutes suit against the other concerning this agreement the prevailing party is entitled to reasonable attorney's fees and expenses.

The trial court's award of attorney's fees to the bank was based upon its decision that the agreement is unenforceable based upon the statute of frauds. Since that decision is in error, the award of attorney's fees was error. This court should reverse the trial court's decision granting the bank's motion for Summary Judgment based on the statute of frauds. The court should also rule that the agreement is enforceable and that it expressly provides that the bank is to pay the school mitigation fees. It should also rule that the bank breached the agreement when its employee altered the closing statement that had been prepared by the escrow agent to eliminate a deduction for school mitigation fees from the bank's proceeds at closing. It should also rule that Oakridge is entitled to its reasonable attorney's fees and expenses at trial and remand the matter for an award of attorney's fees in the trial court.

ATTORNEY'S FEES ON APPEAL

This court should also award Oakridge its attorney's fees incurred on appeal pursuant to paragraph P of the February 24, 2011 Purchase and Sale Agreement and the Counteroffer Addendum signed by both parties. The award of fees should be

determined on a motion to be heard after the court's decision on this case is issued.

IV.

CONCLUSION

Oakridge Homes asks the court to take the following steps:

1. Reverse the trial court's ruling that the Purchase and Sale Agreements executed in this cause are unenforceable based upon the statute of frauds and expressly hold that the agreements satisfy the statute of frauds; and

2. Rule that the language of the Purchase and Sale Agreement of February 24, 2011 and the Counteroffer Addendum require the bank to pay the school mitigation fees at issue in this case; and

3. Rule that the bank breached the Purchase and Sale Agreement by altering the closing documents prepared by the escrow agent to eliminate as the deduction from the bank's proceed of the school mitigation fees for the lots purchased and remand the case to the trial court for determination of the remedies available to Oakridge resulting from the bank's breach; and

4. Reverse the trial court's award of attorney's fees to the bank and order that Oakridge be entitled to all of its reasonable

attorney's fees and expenses incurred in the trial court both prior to this appeal and upon remand; and

5. Order that the bank is required to pay reasonable attorney's fees for Oakridge in pursuing this appeal.

RESPECTFULLY SUBMITTED this 15 day of May, 2012.

By _____
BART L. ADAMS, WSBA #11297
Attorney for Appellant

NO. 43030-4-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

OAKRIDGE HOMES II, LTD., a Washington corporation,
Appellant,

v.

FIRST CITIZENS BANK & TRUST COMPANY, a
Washington corporation,
Respondents,

AFFIDAVIT OF MAILING

Bart Adams, Attorney for Oakridge Homes II, LTD, Appellant
2626 N. Pearl
Tacoma, WA 98407
(253) 761-0141
WSBA #11297

STATE OF WASHINGTON)
) ss.
County of Pierce)

The undersigned, being first duly sworn on oath, deposes and states:

That I am a citizen of the United States; over legal age; not a party to this proceeding; competent to be a witness herein; that on the 15th day of May, 2012, I mailed a true and correct copy of Appellant Oakridge Homes II, LTD's Brief of Appellant, which is identical to the original thereof, which are on file with the Clerk of this Court addressed to:

Robert G. Casey
Attorney at Law
1201 Pacific Avenue, Suite 1200
Tacoma, Washingto 98402-4395

That the same was deposited into the United States mail in a sealed envelope, with correct postage affixed, by first class mail.

JEANNE GLEIM

SUBSCRIBED AND SWORN to before me this 15th day of May, 2012.

NOTARY PUBLIC in and for the
State of Washington,
Residing at Fox Island, WA.
My Commission Expires: 11-15-12